

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY BURCIAGA,

Defendant and Appellant.

F057834

(Super. Ct. No. MCR021365A)

OPINION

APPEAL from a judgment of the Superior Court of Madera County. Jennifer R.S. Detjen, Judge.

Eileen S. Kotler, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Stephen G. Herndon and Paul E. O'Connor, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

A jury convicted appellant Anthony Burciaga of the first degree murder of Theodore Betts. The jury also found that the murder was committed in the course of a robbery and that Burciaga personally and intentionally used a firearm. Burciaga contends (1) the trial court erred in denying his motion to suppress evidence and in failing sua sponte to instruct the jury on second degree murder and involuntary manslaughter; (2) trial counsel rendered ineffective assistance; and (3) cumulative error. We reject Burciaga's contentions and affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

Gabriel Martin and Theodore Betts lived together in a remote location in Madera County. Martin and Betts grew marijuana and stored a large amount of marijuana on their property. On the morning of March 21, 2005, Martin and Betts were at home when Martin heard a car driving up their driveway and heard their dogs barking.

Martin stepped outside the house and walked up the driveway. Martin saw a blue SUV stopped in the driveway. The driver of the SUV, Marissa Rubianes, asked if there were any properties in the area for sale or rent. Martin told Rubianes he did not know of any such properties and asked her to turn around and leave.

At that point, Burciaga and another man, Rudy Castillo, came out from around the back of the SUV. Burciaga had a shotgun; Castillo had a handgun. Burciaga told Martin to keep the dogs away from him; Burciaga then pointed the shotgun in Martin's direction and threatened to shoot the dogs. Burciaga ordered Martin to walk back toward the house. Martin complied, with Burciaga following and pointing the shotgun at him. When Martin got to the stairs outside the house, he saw Betts in the doorway of the house pointing a shotgun. Betts yelled at Martin to get another gun; Martin stepped inside to comply. Betts stepped outside. As Martin was reaching for a rifle in the house, he heard a shotgun blast. The shotgun blast came from near the door where Betts was standing.

Martin went to exit the house just as Betts was coming in the door. Betts was bleeding and exclaimed, "He hit me. He hit me. They got me. They got my arm."

Martin went outside, did not see anyone, and fired his rifle at a nearby hill to let the intruders know he had a weapon.

Martin called 911. He told the 911 operator that Burciaga and his companions had tried to rob Betts. Martin tried to administer first aid. Although law enforcement and paramedics arrived, Betts died shortly after their arrival. Betts bled to death from shotgun wounds to his left shoulder and underarm area.

Deputy Roy Broomfield received a sheriff's radio broadcast about the shooting. He immediately started driving toward the Betts residence. About a half mile from the house he spotted Burciaga and Anthony Mendez. They matched the description of perpetrators issued over the radio. They seemed out of breath, in a hurry, and their pant legs were wet and muddy. Burciaga had cuts on his chin. Broomfield handcuffed the two men and placed them in the back of his patrol car.

A short distance from where Broomfield had encountered Burciaga and Mendez, Broomfield saw shoe prints on the side of a hill. Broomfield showed the shoe prints to Sergeant Charles Bump, who tracked the shoe prints back to Martin and Betts's property. There were two sets of prints -- one had a herringbone pattern and the other a flame pattern.

Along the trail of shoe prints, law enforcement found a 12-gauge shotgun with no stock; there were four shells in the shotgun. The shotgun was lying on top of fresh grass. They also found the handgun, a New England .32-caliber revolver.

Near the southeast corner of Martin and Betts's house, law enforcement found a herringbone pattern shoe print and a 12-gauge shotgun shell casing in close proximity to each other. The shell casing was about 10 feet from the southeast corner of the house; the shoe print was about a foot from the shell casing. The herringbone shoe print at the house was very similar to the shoe print that Bump had been tracking.

The herringbone shoe prints were similar in pattern and size to Burciaga's shoes; the flame print matched Mendez's shoes. Law enforcement concluded that Burciaga

made the herringbone shoe print impressions. The shotgun shell casing found outside Betts's home was fired from the shotgun found along the shoe print trail.

Codefendant Rubianes testified that after the robbery attempt, she found masks and bullets in the SUV. She claimed she did not know Burciaga and Mendez were planning to rob the victims; she thought they were going to buy marijuana.

Interviews of Burciaga

Burciaga was interviewed by Detectives John Grayson and Jerry Saldivar at around 1:25 p.m. on March 21, 2005. A tape of the interview was played for the jury. Burciaga claimed he was set up. Burciaga admitted, however, there was a plan to take marijuana from Martin and Betts. Burciaga was told the victims had a lot of marijuana and to look for a cave where the marijuana was hidden. Burciaga stated he was not planning to hurt anyone.

According to Burciaga, the plan had been developed by "Juetto." Burciaga owed money to Juetto; Burciaga was to take the marijuana in order to pay his debt to Juetto. Burciaga admitted that he and the others with him did not go to Martin and Betts's property to buy a small amount of marijuana. Burciaga and his cousin, Mendez, were both in on the plan.

When they got to Martin and Betts's property, one of the owners (Martin) met them and the other (Betts) came out of the house and started shooting. Burciaga shot back and, when his gun recoiled, it hit him and cut his chin. Burciaga ran from the property and met up with Mendez. Burciaga discarded his 12-gauge shotgun in the woods. He and Mendez walked out to a dirt road, where they encountered an officer.

Grayson told Burciaga that Betts was dead and Burciaga responded, "No way." Burciaga stated he did not try to kill anyone. He was sorry about what had happened.

Burciaga was interviewed for a second time on March 21 commencing around 5:25 p.m. by Detectives Grayson and Saldivar. The jury heard a tape of this interview. Burciaga reiterated that he was in debt to a man and he had agreed to the crime in order

to pay his debt to the man. Burciaga also claimed he had told his coconspirators he did not want anyone to die.

Burciaga was told the marijuana would be at property occupied by two old men. Burciaga was told by a man named “Bob” the specific locations on the property where Burciaga could find the marijuana, an RV, the basement, and a cave. Burciaga had visited the property about nine months before the crime. On the day of the crime, Burciaga brought a taser and a handgun; someone else supplied the shotgun.

Burciaga denied shooting Betts, but claimed that Betts came out of the house “blasting.” Burciaga also claimed that he shot to scare to Betts, not to kill him. Later, Burciaga claimed that he had killed someone for nothing. Burciaga claimed that Bob was Betts’s son-in-law and Bob wanted Betts killed so he could inherit. Law enforcement was not able to locate “Bob.”

Burciaga and codefendants Mendez, Rubianes, and Castillo were charged with one count of first degree murder. It also was alleged that the murder was committed in the course of a robbery. It also was alleged that Burciaga personally and intentionally discharged a firearm. On March 25, 2008, the trial of Burciaga and Rubianes was severed from the trial of Mendez and Castillo.¹

Motion to Suppress

Burciaga filed a motion to suppress on May 3, 2007. In his motion, he argued that all evidence should be suppressed for three reasons: (1) he had not been properly advised of his *Miranda*² rights before questioning and had not waived his right to remain silent or to be represented by an attorney; (2) his due process rights had been violated because

¹We previously issued opinions on the appeals filed by Mendez (*People v. Mendez* (Aug. 11, 2009, F055677) [nonpub. opn.]) and Castillo (*People v. Castillo* (June 29, 2009, F055493) [nonpub. opn.]).

²*Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

Martin's identification of him as a perpetrator was tainted when Martin was told by law enforcement that the perpetrators had been caught; and (3) there was no probable cause to stop him on the road and arrest him. A hearing was held at which evidence was presented.

The trial court denied the motion. The trial court found there was probable cause to arrest Burciaga and specifically cited (1) the description of the suspects, (2) the remoteness of the area, (3) Burciaga's surprise at seeing a sheriff's car, (4) Burciaga was walking away from the crime scene, (5) the shoe tracks on the side of the road, (6) the mud on Burciaga's pants and shoes, and (7) Burciaga's confession. The trial court also found that Burciaga's statements to law enforcement were not coerced or in violation of his *Miranda* rights; Burciaga clearly stated he understood his *Miranda* rights before confessing. The trial court also found that Martin's identification of Burciaga was reliable under the totality of the circumstances.

Trial

Trial began on April 16, 2008. On May 7 the jury returned its verdicts, finding that Burciaga committed first degree murder, the murder was committed in the course of a robbery, and he personally and intentionally discharged a firearm, causing the death of the victim. Rubianes was acquitted.

DISCUSSION

I. Motion to Suppress

Burciaga contends that when he was stopped, frisked, handcuffed, and placed in the back of Broomfield's vehicle to be transported to the scene of the crime, he was under arrest and the arrest was without probable cause; therefore, all physical evidence, identifications, and his confession must be suppressed as they flow from an illegal arrest. In a related argument, Burciaga also contends his detention was prolonged unduly. He

also maintains that his confessions were involuntary. Consequently, he asserts his motion to suppress should have been granted. We disagree.

Standard of Review

Our standard of review of an order denying a motion to suppress is well settled. When a trial court rules on a suppression motion, it sits as a trier of fact with the power to judge credibility, resolve conflicts, weigh evidence and draw inferences. On review of this ruling, our role is limited. All presumptions favoring the trial court's proper exercise of its power and its findings, express and implied, must be upheld if supported by substantial evidence. (*People v. Glaser* (1995) 11 Cal.4th 354, 362 (*Glaser*).) We then independently review the question of law whether the undisputed facts, or facts found by the trial court upon conflicting substantial evidence, show the search and seizure were constitutional. (*People v. Coulombe* (2000) 86 Cal.App.4th 52, 56 (*Coulombe*).)

Detention and Arrest

The distinction between a detention and an arrest “may in some instances create difficult line-drawing problems.” (*United States v. Sharpe* (1985) 470 U.S. 675, 685 (*Sharp*); *United States v. Torres-Sanchez* (9th Cir. 1996) 83 F.3d 1123, 1127 [there is no “bright-line for determining when an investigatory stop crosses the line and becomes an arrest”].) This much is clear: A brief stop and patdown of someone suspected of criminal activity is merely an investigative detention requiring no more than a reasonable suspicion. (*Terry v. Ohio* (1968) 392 U.S. 1, 6-7 (*Terry*).) But removing a 17-year-old youth from his bed at 3:00 a.m. and transporting him in handcuffs by patrol car to the police station for questioning has been held to be unreasonable absent probable cause to believe that the youth has committed a crime. (*Kaupp v. Texas* (2003) 538 U.S. 626, 630.) In the high court's view, such “involuntary transport to a police station for questioning is ‘sufficiently like arrest to invoke the traditional rule that arrests may constitutionally be made only on probable cause.’ [Citation.]” (*Ibid.*)

“[T]here is no hard and fast line to distinguish permissible investigative detentions from impermissible de facto arrests. Instead, the issue is decided on the facts of each case, with focus on whether the police diligently pursued a means of investigation reasonably designed to dispel or confirm their suspicions quickly, using the least intrusive means reasonably available under the circumstances. [Citations.]” (*In re Carlos M.* (1990) 220 Cal.App.3d 372, 384-385 (*Carlos M.*); see also *Sharpe, supra*, 470 U.S. at pp. 685-688.) Important to this assessment, however, is the “duration, scope and purpose” of the stop. (*Wilson v. Superior Court* (1983) 34 Cal.3d 777, 784.)

Broomfield was on patrol when he heard radio reports of the shooting and proceeded toward the crime scene. The radio reports indicated that the suspects were possibly three men and a woman, dark-skinned, possibly Indian (Native American), and around 20 to 30 years old. As he neared the scene of the shooting, Broomfield saw two men on the side of the road who fit the description given over the radio, i.e., dark-skinned, possibly Native American, and 20 to 30 years old.

The men seemed to be in a hurry. They were walking fast, appeared out of breath, and their shoes and pants were wet and muddy. This was a very rural area with few homes. There was not much foot traffic in the area, and it was odd to see two people walking who were wet and muddy from the knees down. Broomfield stopped the men, handcuffed them, placed them in the back of his patrol car, and ordered them not to talk.

The Fourth Amendment to the United States Constitution protects citizens from unreasonable searches and seizures by law enforcement. (*Katz v. United States* (1967) 389 U.S. 347, 353; *People v. Maury* (2003) 30 Cal.4th 342, 384.) “Although police officers may not arrest or search a suspect without probable cause and an exception to the warrant requirement, they may temporarily detain a suspect based only on a ‘reasonable suspicion’ that the suspect has committed or is about to commit a crime. [Citations.] Such detentions are permitted, notwithstanding the Fourth Amendment’s requirements of probable cause and a search warrant, because they are ‘limited intrusions’ that are

‘justified by special law enforcement interests.’ [Citations.]” (*People v. Bennett* (1998) 17 Cal.4th 373, 386-387 (*Bennett*).)

“‘[I]n order to justify an investigative stop or detention the circumstances known or apparent to the officer must include specific and articulable facts causing him to suspect that (1) some activity relating to crime has taken place or is occurring or about to occur, and (2) the person he intends to stop or detain is involved in that activity. Not only must he subjectively entertain such a suspicion, but it must be objectively reasonable for him to do so: the facts must be such as would cause any reasonable police officer in a like position, drawing when appropriate on his training and experience [citation], to suspect the same criminal activity and the same involvement by the person in question. The corollary to this rule, of course, is that an investigative stop or detention predicated on mere curiosity, rumor, or hunch is unlawful, even though the officer may be acting in complete good faith. [Citation.]’” (*People v. Loewen* (1983) 35 Cal.3d 117, 123, quoting *In re Tony C.* (1978) 21 Cal.3d 888, 893.)

That Burciaga and Mendez fit the description of the suspects, they were found a short distance from the crime scene, and their muddy appearance and presence in the rural area on foot was unusual were specific and articulable facts that gave rise to a reasonable suspicion the two may have been involved in the shooting and justified their detention. (*Bennett, supra*, 17 Cal.4th at pp. 386-387.)

After detaining Burciaga and Mendez, Broomfield continued on toward the crime scene, a distance of about one-half mile. Along the way, Broomfield saw shoe prints in a muddy dirt bank along the roadside. The mud on the men’s shoes was consistent with the mud along the dirt bank. There were shoe tracks at the scene of the crime.

Broomfield spoke to Grayson, the lead detective, at the scene and told Grayson he had picked up two men a short distance from the crime scene. Grayson spoke to a witness who had seen two men running from the scene of the shooting through the trees; they had shaved heads. Grayson also spoke to Martin, who described the perpetrators.

That Burciaga was stopped on the road, handcuffed, and transported to the crime scene, as occurred here, does not convert a detention into an arrest. (See *People v. Soun* (1995) 34 Cal.App.4th 1499, 1517 [detention when the defendant “was removed from the car at gunpoint by a large number of police officers, was forced to lie on the ground, was handcuffed and placed in a patrol car, was transported from the site of the stop a distance of three blocks to a parking lot” where he was held for 30 minutes]; *Carlos M., supra*, 220 Cal.App.3d at p. 384 [detention when the defendant was handcuffed and transported to hospital for identification by rape victim; 30-minute duration]; *Haynie v. County of Los Angeles* (9th Cir. 2003) 339 F.3d 1071, 1077 [“A brief ... restriction of liberty, such as handcuffing, during a *Terry* stop is not a de facto arrest”]; *Gallegos v. City of Los Angeles* (9th Cir. 2002) 308 F.3d 987, 991 [driver stopped at gunpoint and ordered out of his truck, was handcuffed and held in a patrol car between 45 and 60 minutes, was detained, not arrested]; *U.S. v. Alvarez* (9th Cir. 1990) 899 F.2d 833, 838-839 [investigative detention when the defendant forced at gunpoint to get out of his car]; *U.S. v. Buffington* (9th Cir. 1987) 815 F.2d 1292, 1300 [no arrest when driver was stopped at gunpoint, ordered out of car, and forced to lie on the ground]; *United States v. Bautista* (9th Cir. 1982) 684 F.2d 1286, 1289 [handcuffing did not convert detention into arrest].)

Once Burciaga and Mendez had been detained, the actions of Broomfield did not go beyond those necessary to effectuate the purpose of the stop, that is, quickly to dispel or confirm police suspicions of criminal activity. (*Florida v. Royer* (1983) 460 U.S. 491, 500; *Carlos M., supra*, 220 Cal.App.3d at p. 384.) Broomfield was already on his way to the crime scene and a short distance away when he encountered Mendez and Burciaga. Continuing on to the crime scene was the most expeditious means of investigation reasonably designed “to dispel or confirm their suspicions quickly, using the least intrusive means reasonably available under the circumstances” of this case, including the remoteness of the location. (*Carlos M., supra*, 220 Cal.App.3d at pp. 384-385.)

As Broomfield continued toward the crime scene, he and other law enforcement personnel encountered additional evidence that could confirm or deny suspicions of criminal activity: (1) two sets of shoe prints in the muddy dirt road, matching the muddy appearance of Burciaga and Mendez; (2) the witness who saw two men leaving the scene and running into the woods, where the muddy tracks started; (3) the two sets of shoe prints were similar in pattern to the patterns on the bottom of Mendez's and Burciaga's shoes; (4) a shotgun was found along the shoe print trail; and (5) a shotgun casing was found at the scene of the shooting. When there is a remote location and evidence is in the process of being gathered, a longer detention may be justified. (*People v. Williams* (2007) 156 Cal.App.4th 949, 953-954, 959-960.)

We need not decide the exact point at which the detention may have ripened into an arrest. The additional evidence accumulated by law enforcement at the scene provided a basis of escalating cause, culminating in probable cause to arrest. This was a rapidly developing situation, with additional evidence coming to light indicating that Burciaga was involved in the shooting. (*Sharpe, supra*, 470 U.S. at pp. 687-688.) Considering the rapidly developing situation with the discovery of additional evidence confirming suspicions of criminal activity by Burciaga, the detention was not prolonged unduly before it ripened into an arrest. (*People v. Bell* (1996) 43 Cal.App.4th 754, 767; *People v. Superior Court (Price)* (1982) 137 Cal.App.3d 90, 98.)

Alternatively, the facts of this case support a conclusion that Broomfield had probable cause to arrest Burciaga at the time Broomfield stopped Burciaga on the road, handcuffed him, and placed him in the back of the patrol vehicle. Probable cause exists when the facts known to the arresting officer would persuade someone of “‘reasonable caution’” that the person to be arrested has committed a crime. (*Dunaway v. New York* (1979) 442 U.S. 200, 208, fn. 9.) “[P]robable cause is a fluid concept -- turning on the assessment of probabilities in particular factual contexts.” (*Illinois v. Gates* (1983) 462 U.S. 213, 232.) “The probable-cause standard is incapable of precise definition or

quantification into percentages because it deals with probabilities and depends on the totality of the circumstances. [Citations.]” (*Maryland v. Pringle* (2003) 540 U.S. 366, 371.) “[T]he substance of all the definitions of probable cause is a reasonable ground for belief of guilt,” and that belief must be “particularized with respect to the person to be ... seized.” (*Ibid.*)

To reiterate the totality of the circumstances: (1) Broomfield was heading toward the crime scene in response to the radio call; (2) Burciaga and Mendez matched the description of the men involved in the shooting; (3) their pants and shoes were wet and muddy and they seemed in a hurry and out of breath; (4) Burciaga was stopped less than a half mile from the shooting; (5) it was unusual to see people on foot in this very rural area; and (6) Burciaga was stopped minutes after the report of the shooting had been broadcast to law enforcement.

The facts and circumstances of the instant case are substantially similar to *People v. York* (1980) 108 Cal.App.3d 779 and *In re Louis F.* (1978) 85 Cal.App.3d 611 (*Louis F.*), where it was held there was probable cause to arrest. In *York*, about 15 minutes before the officer stopped York, the officer had received a report of a prowler in the area and a description of the prowler; York reasonably matched the description. York was one street over from where the prowler had been seen, had a bleeding scratch on his face, and had been running. York’s failure to explain his presence in the area also was suspicious. The appellate court held that there was probable cause to arrest York. (*York*, at p. 785.)

Similarly, in *Louis F.*, a murder occurred early in the morning at a gas station. A truck driver nearby heard the gunshot and saw a man running from the station, although he could not see the man’s face. The truck driver was able to describe the man’s clothing and general appearance. The man was seen running across the freeway. Sheriff’s deputies were called and responded. A description was broadcast over the department radio. Several minutes later, a sheriff’s officer on patrol saw a man fitting the description

on foot in an isolated industrial area. The man, Louis F., was placed under arrest. (*Louis F.*, *supra*, 85 Cal.App.3d at p. 614.) The appellate court held there was probable cause to arrest because the arresting officer was aware there had been a shooting in the vicinity, Louis F. matched the general description of the shooter, and he was found on foot in an area generally devoid of foot traffic. (*Id.* at p. 616.)

Voluntariness of Statements

We next analyze whether Burciaga's statements to law enforcement were voluntary. He claims his statements were not voluntary and were in violation of his right to an attorney.

While at the crime scene and in the back of Broomfield's patrol vehicle, Burciaga told one of the deputies at the scene that he wished to speak to the lead detective, Grayson. Grayson walked to the patrol vehicle; Burciaga was crying and stated he wished to talk. Grayson read Burciaga his rights from a department-issued *Miranda* card. Grayson asked Burciaga if he understood his rights. Burciaga nodded in the affirmative and grunted a "yes." Burciaga made a statement to Grayson. Grayson spoke with Burciaga again, less than an hour after advising Burciaga of his rights. After this conversation, Grayson directed that Burciaga be transported to jail or the detectives' office. Grayson spoke with Burciaga a third time at the detectives' office.

"An appellate court applies the independent or de novo standard of review, which by its nature is nondeferential, to a trial court's granting or denial of a motion to suppress a statement under *Miranda* insofar as the trial court's underlying decision entails a measurement of the facts against the law. [Citations.]" (*People v. Waidla* (2000) 22 Cal.4th 690, 730.) In analyzing Burciaga's claim of involuntariness, we note that it was he who initiated the first conversation with Grayson, and Grayson advised Burciaga of his *Miranda* rights prior to beginning that first conversation.

Despite these facts, Burciaga contends that because (1) he was subject to an unduly prolonged detention, (2) he was emotional when he made his statement,

(3) Grayson denigrated his *Miranda* rights, and (4) he did not expressly waive his rights, his statements were involuntary and should have been excluded.

We previously discussed Burciaga's claim of an unduly prolonged detention, determining the detention was not unduly prolonged under the circumstances. The length of Burciaga's detention was not such that his statement was rendered involuntary. Burciaga states that he was detained at around 9:25 a.m. and his initial statement to Grayson was made at around 12:45 p.m., slightly over three hours later. This amount of time was not of sufficient length to render his statement involuntary, under the circumstances. (*People v. Neal* (2003) 31 Cal.4th 63, 78, 81-82 [overnight custody without access to food, water, toilet facilities, or an attorney renders statement involuntary]; *People v. Alfieri* (1979) 95 Cal.App.3d 533, 543, 545-546 [36 hours of custody and 20 hours of interrogation renders statement involuntary].)

That Burciaga was crying or emotionally upset does not render his statement involuntary. (*People v. Whitson* (1998) 17 Cal.4th 229, 236, 240, 249-250.) Grayson's reference to *Miranda* warnings as "technical crap" clearly was inappropriate and the trial court so found. Grayson, however, did issue the standard *Miranda* warnings after Burciaga asked to speak with him and before allowing Burciaga to speak.

Burciaga also contends that he did not expressly waive his *Miranda* rights, although he acknowledges he implicitly waived his rights. Even if Burciaga's affirmative nod and a grunted "yes" constitute an implied waiver, an implied waiver is sufficient to waive *Miranda* rights. (*People v. Rios* (2009) 179 Cal.App.4th 491, 499, 507.)

Burciaga also contends his subsequent statements should be excluded because he was not readvised of his *Miranda* rights. If a defendant is subsequently interrogated, however, "readvisement is unnecessary where the subsequent interrogation is 'reasonably contemporaneous' with the prior knowing and intelligent waiver. [Citations.]" (*People v. Mickle* (1991) 54 Cal.3d 140, 170, 171 (*Mickle*) [readvisement unnecessary where the defendant twice received and twice waived *Miranda* rights 36 hours before].)

The length of time between Burciaga's initial statement to Grayson and his subsequent statements was not so lengthy as to reduce the effectiveness of his initial waiver, particularly where Burciaga was mentally alert, initiated the conversation, understood what was going on in the subsequent interrogations, and was interrogated by the same law enforcement official each time. (*Mickle, supra*, 54 Cal.3d at p. 170; *People v. Lewis* (2001) 26 Cal.4th 334, 386.)

Identification at Scene

Burciaga contends Martin's in-field identification of him was unreliable and cannot be used as a basis for finding probable cause. "The cases hold that despite an unduly suggestive identification procedure, we may deem the identification reliable under the totality of the circumstances, after we consider such factors as the witness's opportunity to view the suspect at the time of the offense, the witness's degree of attention at that time, the accuracy of the witness's prior description, the level of certainty the witness expressed when making the identification, and the lapse of time between the offense and the identification. [Citation.]" (*People v. Cook* (2007) 40 Cal.4th 1334, 1354 (*Cook*); see also *Neil v. Biggers* (1972) 409 U.S. 188, 199-200.)

Even though there is evidence in the record that might support a conclusion there was an unduly suggestive identification procedure, specifically, when Grayson told Martin the suspects were coming to the property to take the marijuana and kill the victims, the identification is not necessarily unreliable. (*Cook, supra*, 40 Cal.4th at p. 1354.)

Prior to Grayson's arrival at the scene, Martin had been shown Burciaga and Mendez in the back of the patrol car. Martin stated he could not look at the suspects and then stated, "it might be them. I don't know." After Grayson arrived at the scene, he obtained a description of the suspects from Martin and from the witness who saw two men running toward the trees. Burciaga and Mendez fit those descriptions. Grayson told Martin the suspects were coming to his property to kill him and take his marijuana. After

this comment, Grayson arranged for an in-field identification, where Martin identified Burciaga.

Despite the comment from Grayson about both suspects, at the in-field identification Martin identified Burciaga as the one holding the shotgun, but he was not sure Mendez was the man holding the pistol. This indicates that Martin was not basing his identification on Grayson's comment. Furthermore, that Martin was not sure Burciaga and Mendez were two of the perpetrators when he first saw them, which would have been minutes after Betts died, reasonably could have been the result of other factors, including an emotional state resulting from the death of his friend and the immediate stress of the situation.

There was ample probable cause to arrest Burciaga, irrespective of any in-field identification by Martin: (1) Burciaga's appearance matched substantially the description of the perpetrators given out on the radio; (2) another witness had seen two men running from the scene into the woods; (3) the shoe print trail led through the woods and out to the road where Burciaga and Mendez were apprehended; (4) the shoe print trail was muddy, consistent with the mud on Burciaga; (5) a shotgun casing was found at the scene and a shotgun was found along the shoe print trail; and (6) Burciaga confessed to Grayson at the scene. All of this evidence combined was more than ample to constitute probable cause to arrest Burciaga.

Physical Evidence

Burciaga contends that because his detention and arrest were illegal, the evidence obtained as a consequence of his arrest, specifically his shoe prints and statements to law enforcement, must be excluded.

We previously concluded that probable cause supported Burciaga's arrest and his statements to law enforcement were made voluntarily after waiving his *Miranda* rights. Therefore, any physical evidence obtained as a result of his arrest, including his shoe prints and matching his shoe prints to the tracks through the woods, is admissible.

Conclusion

We conclude the trial court did not err in denying the motion to suppress.
(*Coulombe, supra*, 86 Cal.App.4th at p. 56.)

II. Instructional Error

Burciaga contends the trial court erred prejudicially when it failed sua sponte to instruct the jury on lesser included offenses of second degree murder and involuntary manslaughter.

In a criminal case, the jury may convict the defendant of either the charged offense or a lesser offense that is necessarily included within the charged offense. (Pen. Code, § 1159.) “‘Under California law, a lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser.’ [Citation.]” (*People v. Breverman* (1998) 19 Cal.4th 142, 154, fn. 5.)

A court must instruct sua sponte on general principles of law that are closely and openly connected with the facts presented at trial. (*People v. Wickersham* (1982) 32 Cal.3d 307, 323, disapproved on another point in *People v. Barton* (1995) 12 Cal.4th 186, 200-201.) This sua sponte obligation extends to lesser included offenses if the evidence raises a question as to whether all of the elements of the charged offense are present and there is evidence that would justify a conviction of such a lesser offense. (*People v. Ramkeesoon* (1985) 39 Cal.3d 346, 351.) A criminal defendant is entitled to an instruction on a lesser included offense only if there is evidence that, if accepted by the trier of fact, would absolve the defendant from guilt of the greater offense but not the lesser. (*People v. Memro* (1995) 11 Cal.4th 786, 871.)

Burciaga argues that because he and Rubianes claimed they went to Martin and Betts’s home to purchase marijuana, not to rob the two men, the trial court should have instructed the jury sua sponte on second degree murder and involuntary manslaughter.

The People contend the evidence of attempted robbery was overwhelming and there was no substantial evidence supporting any theory other than felony murder. We agree with the People.

“The requirement that courts give sua sponte instructions on lesser included offenses ‘is based in the defendant’s constitutional right to have the jury determine every material issue presented by the evidence. [Citations.]’ [Citation.]” (*People v. Lopez* (1998) 19 Cal.4th 282, 288.) Contrary to Burciaga’s contention, the evidence did not present an issue of second degree murder or involuntary manslaughter.

At trial the People proceeded only on a theory of felony murder. In Burciaga’s pretrial statements to law enforcement, he admitted (1) there was a plan to take large quantities of marijuana from Betts and Martin; (2) he planned and did research before heading out, including visiting the victims’ property nine months before the crime; (3) he did not want anyone to die; (4) he brought a gun and taser with him; and (5) Rubianes was to act as a diversion to get the property owners to come out of their house. When Burciaga and the others arrived at the property, Rubianes asked about real property in the area for sale. No inquiry about purchasing marijuana was made. When the SUV stopped on the property, Burciaga jumped out, brandishing a shotgun. Rubianes admitted that she found masks and bullets in the SUV after the attempted robbery. Burciaga specifically admitted in his pretrial statements that he and the others had not gone to the Betts and Martin residence to purchase marijuana.

When the People establish that a defendant killed a victim while committing a felony enumerated in Penal Code section 189, including robbery or attempted robbery, the killing is deemed to be first degree murder as a matter of law. (*People v. Mendoza* (2000) 23 Cal.4th 896, 908-909 (*Mendoza*).) The evidence is overwhelming that Burciaga and his cohorts (1) planned to take marijuana by force, (2) came armed with weapons and prepared to use force, and actually used force, (3) had supplies with them to facilitate a robbery, such as masks, a taser, and the guns, and (4) made no effort

whatsoever to purchase any marijuana, as opposed to taking marijuana forcibly. Consequently, the evidence was overwhelming that the killing occurred during an attempted robbery.

Even if Burciaga and the others did not intend to kill anyone during the planned robbery, the killing is still felony murder. The jury was instructed, correctly, that a person may be guilty of felony murder, even if the killing was unintentional, accidental, or negligent.

The jury was instructed, however, on Burciaga's theory of defense -- that he went to the property to purchase marijuana. The jury was instructed that if the jury believed Burciaga had gone to Martin and Betts's home to purchase marijuana, he did not have the mental state required for robbery. If the jury had a reasonable doubt as to whether Burciaga had the requisite mental state for robbery, the jury was instructed to find him not guilty of that crime.

Virtually the only evidence that Burciaga and the others may have gone to Martin and Betts's property to purchase marijuana was Rubianes's testimony at trial that she drove to the property in order to purchase marijuana. She did not know Burciaga and the others had planned a robbery. This evidence is slight in light of Rubianes's own conduct at the scene of the crime in failing to ask about a marijuana purchase and the overwhelming evidence that Burciaga and the others planned and were prepared to use force to rob Martin and Betts of the marijuana.

When the evidence "points indisputably to a killing committed in the perpetration of one of the felonies" enumerated in Penal Code section 189, a trial court need not instruct a jury on offenses other than first degree felony murder. (*Mendoza, supra*, 23 Cal.4th at pp. 908-909.) If Burciaga had the requisite mental state required for robbery, the killing was felony murder; if he did not, the killing was not felony murder and the jury was so instructed. Thus, if the jury found Burciaga lacked the requisite intent for robbery, he would not have been found guilty of felony murder.

We conclude the trial court did not err in failing to instruct the jury on second degree murder or involuntary manslaughter.

III. Ineffective Assistance of Counsel

Burciaga claims he received ineffective assistance of counsel because defense counsel (1) conceded Burciaga fired the fatal shot that killed Betts, and (2) relied upon an inapplicable defense, specifically, imperfect self-defense. We disagree.

“Under both the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution, a criminal defendant has the right to the assistance of counsel.” (*People v. Ledesma* (1987) 43 Cal.3d 171, 215.) To establish constitutionally ineffective assistance of counsel, “a defendant must show both that his counsel’s performance was deficient when measured against the standard of a reasonably competent attorney and that counsel’s deficient performance resulted in prejudice to defendant.” (*People v. Lewis* (2001) 25 Cal.4th 610, 674.) The burden of proving ineffective assistance of counsel is on the defendant. (*People v. Pope* (1979) 23 Cal. 3d 412, 425.)

Defense counsel argued (1) the People had failed to prove an intent to rob, and (2) Burciaga and the others went to Martin and Betts’s home to purchase marijuana. Defense counsel also argued that Burciaga shot Betts because Betts pointed a gun at him and there was gunfire. Defense counsel specifically stated Burciaga did not shoot Betts in order to steal marijuana and that Betts pursued Burciaga as he attempted to flee.

Defense counsel’s argument was reasonable in light of the state of the evidence. Martin testified that Burciaga was the one holding the shotgun. In his first interview with Grayson, Burciaga stated that he shot back when one of the owners came out of the house and started shooting. In his second interview with Grayson, Burciaga first denied shooting Betts and then stated that he shot to scare Betts, not to kill him. Burciaga also stated in the second interview that Betts shot first and that killing Betts was an accident.

The physical evidence established that Betts died from a shotgun wound. Shoe prints bearing a herringbone pattern, the same as found on the bottom of Burciaga's shoes when arrested, were found in the dirt near a spent shotgun casing where Betts was shot.

Defense counsel's argument to the jury that Betts was the shooter was wholly consistent with Burciaga's statements to law enforcement and the physical evidence in the case.

We additionally reject Burciaga's claim that defense counsel argued an inapplicable defense. Burciaga misconstrues defense counsel's argument. Defense counsel did not assert imperfect self-defense by one who was a felon or aggressor. Defense counsel argued that Burciaga was not at Martin and Betts's to rob them but to purchase marijuana and that Betts was the aggressor who first fired shots. Burciaga fired only in response to shots being fired at him.

Courts repeatedly have rejected claims of ineffective assistance of counsel in other cases involving concessions made by defense counsel in closing argument where the incriminating evidence was strong and defense counsel offered some other choice in the defendant's favor. We do so here as well. (See, e.g., *People v. Bolin* (1998) 18 Cal.4th 297, 334-335 [rejecting a claim of ineffective assistance of counsel related to defense counsel's concession of some measure of culpability as a valid tactical choice given the overwhelming evidence of the defendant's guilt]; *People v. McPeters* (1992) 2 Cal.4th 1148, 1186-1187 [rejecting a claim of ineffective assistance of counsel related to defense counsel's concession in closing argument that the defendant had been present at the scene of the crime, repudiating the defendant's alibi testimony]; see also *People v. Wade* (1988) 44 Cal.3d 975, 988 ["In light of the overwhelming evidence of his client's guilt, trial counsel had little choice but to candidly acknowledge guilt, concede the heinous nature of the offense, and concentrate instead on convincing the jury of the legitimacy of defendant's mental defenses"]; *People v. Ratliff* (1986) 41 Cal.3d 675, 697 ["Counsel's tactical decision to argue a particular personal view of the evidence, indicating that his

client may have committed only a lesser offense, is not akin to pleading guilty to that offense”]; *People v. Jackson* (1980) 28 Cal.3d 264, 293 [“[G]ood trial tactics demanded complete candor’ with the jury”].)

IV. No Cumulative Error

We have concluded that Burciaga’s multiple claims of error are not meritorious, so there is no cumulative effect from multiple error. (*People v. Heard* (2003) 31 Cal.4th 946, 982.)³

DISPOSITION

The judgment is affirmed.

CORNELL, Acting P.J.

WE CONCUR:

DAWSON, J.

KANE, J.

³On March 24, 2010, Burciaga asked this court to take judicial notice of the records of the State Bar of California reflecting that his trial counsel is now deceased. The People do not oppose the request. This information is not relevant to our analysis of issues in this case and we hereby deny the request.